



## Office of the Attorney General

State of Texas

January 7, 1992

**DAN MORALES**  
ATTORNEY GENERAL

Mr. William Grossenbacher  
Administrator  
Texas Employment Commission  
101 East 15th Street  
Austin, Texas 78778-0001

Open Records Decision No. 599

Re: Whether certain information submitted by employers to the Texas Employment Commission is subject to disclosure under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-2121)

Dear Mr. Grossenbacher:

The Texas Employment Commission ("TEC") received an open records request seeking access to information about employers in sixteen counties. TEC was asked to produce: (1) Standard Industrial Classification (SIC) codes, (2) information indicating the number of employees working for each employer, (3) TEC identification numbers, and (4) information relating to whether employer quarterly tax reports were filed last year. We previously issued Open Records Letter No. 263 (1990) which you have asked us to reconsider. Having done so, we conclude that all of the requested information is excepted from required public disclosure by section 3(a)(1) of the Open Records Act.<sup>1</sup>

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<sup>1</sup>Open Records Letter No. 263 found that article 5221b-9(g), V.T.C.S., did not apply to the requested information, because it is information about the employing units, rather than "information about employees collected from employers," citing Attorney General Opinion H-404 (1974). That opinion determined that the amount of unemployment compensation benefits paid particular individuals or groups is not within the confidentiality provision of article 5221b-9, because, since TEC makes the payments, such information is "not information about employees collected from employers." However, Attorney General Opinion H-404 did not address information obtained from an employer. Nor did Attorney General Opinion H-626 (1975), which concluded that the phrase "information thus obtained or otherwise secured" embraced records pertaining to investigations by TEC, as well as records obtained from either the claimant or the employing unit. Attorney General Opinion H-626 (1975). Open Records Decision No. 235 (1980) concluded that information obtained by TEC relating to the identity of a named employing unit and the partners of the unit was not confidential under article

The unemployment compensation act ("the act") contains a comprehensive system for furnishing financial benefits to persons who are unemployed. The act requires employers to make specified contributions to the Unemployment Compensation Fund, which is used to pay benefits to the unemployed, in accordance with specified schedules and conditions of eligibility. In administering the act, TEC may require employers to submit certain reports and documentation. V.T.C.S. art. 5221b-9(a).

You urge that the requested information is excepted from required disclosure by section 3(a)(1) of the Open Records Act, because it is deemed confidential by statute. You rely on section (g) of article 5221b-9, V.T.C.S., which authorizes TEC to collect information from employers and ensures the confidentiality of information so obtained:

**Records and Reports:** Each employing unit shall keep true and accurate employment records, containing such information as the Commission may prescribe and which is deemed necessary to the proper administration of this Act. Such records shall be open to inspection and subject to being copied by the Commission or its authorized representatives at any reasonable time and as often as may be necessary. The Commission may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which the Commission deems necessary for the effective administration of this Act. *Information thus obtained* or otherwise secured shall not be published or be open to public inspection (other than to public employees in the performance of their public duties) except as the Commission may deem necessary for the proper administration of this Act. (Emphasis added.)

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§221b-9, V.T.C.S., stating that "[w]e do not believe that documents reflecting ownership of a business are employment records within the meaning of section 9(e)." *See also* Open Records Decision No. 182 (1977).

We find that the "information thus obtained" refers to the information obtained from the employers' records and from the reports that employers are required to file with TEC.<sup>2</sup> In our opinion, all information TEC collects on reports it obtains pursuant to section (g) is confidential under this provision, as is all the information in the records TEC secures from the employing unit's files. The purpose of the phrase "with respect to persons employed by it" is to describe in general terms the kind of information that TEC may require employers to report to it.

The kind of information that TEC needs from an employer, such as information necessary to determine its tax liability or to evaluate a claim for benefits from a former employee, is in a general way "employment information" or information "with respect to the persons employed by it." If the information does not fit this description, TEC would not have authority to collect it. Thus, article 5221b-9(g) applies to the entire report that employers file pursuant to valid TEC requirement, and not only to portions of the reports that can be characterized as information related to the employee rather than the employer. Attorney General Opinion H-404 (1974). Open Records Decision Nos. 235 (1980); 182 (1977), and Open Records Letter No. 263 are hereby overruled to the extent of conflict.

Thus, we conclude that the confidentiality of that provision extends to any information that TEC obtains or collects, in "employment records" and "reports." Consequently though the information requested in this case does not identify specific employees, it is within the meaning of "information" of article 5221b-9(g), if it was obtained from an employment record or a TEC-required report. In light of this interpretation of article 5221b-9(g), we will consider whether the requested information, all of which relates to the employers, as opposed to employees, and appears on reports that employers are required by article 5221b-9(g) to submit to TEC, is excepted from disclosure.

#### 1. SIC Code Number

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<sup>2</sup>We will not address the phrase "otherwise secured," since it is not relevant to the question before us.

The SIC code number is based on information provided by the employing unit on the initial Status Report, Form C-1. The C-1 form contains a list of ninety-nine short titles of business descriptions with corresponding code numbers of 01 through 99. In completing this form, an employer is required to select the title which most closely describes his or her business and enter the appropriate code number in the space provided. That number is then used by TEC to assign a beginning tax rate for new employers and to calculate the new tax rate for a given industry. Since a SIC code number is chosen by an employer to describe the business, it is information provided by the employer and therefore confidential within article 5221b-9(g).

## **2. Number Of Employees**

You state that the statewide total number of employees employed by a given employing unit is information collected on Form C-3, a quarterly unemployment tax report, which all employers with unemployment tax liability must submit under article 5221b-9(g). In your brief you state that the number of employees of an employing unit is information reported to TEC in Form C-3. We find that this information is entitled to the protection of article 5221b-9(g).<sup>3</sup>

## **3. Information About Whether An Employer Has Filed A Quarterly Tax Form**

TEC requires quarterly tax forms to be filed by every employing unit which is liable for payment of unemployment tax. You state that TEC does not maintain a list of which businesses have filed the quarterly tax forms (Forms C-3 and C-4). In your original request letter, you state that when you are asked whether a business which is for sale has any outstanding quarterly tax reports, your policy is to provide a "yes" or "no" answer to such questions, without providing any details of the business's tax status. You state that TEC does not maintain a listing of those employers who have filed Forms C-3 and C-4 within the previous year, but that such a listing could be compiled by creating a new computer program or by manually researching the records of each employing unit.

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<sup>3</sup>See Open Records Decision No. 182 (1977) (holding in *dicta* that the number of persons employed at a business is confidential under article 5221b-9(g), V.T.C.S.).

The answer to the question of whether these forms have been filed can be supplied to the requestor in one of two ways: by releasing a listing of all the businesses who have so filed or by releasing the records themselves. As we have said, TEC has not compiled the listing. The Open Records Act does not require the creation of new documents or the compilation of information in response to a request. Attorney General Opinion JM-672 (1987); Open Records Decision No. 342 (1982). Only documents in existence are subject to disclosure. *Id.* Thus, TEC is not required to prepare a listing of businesses who have filed C-3 and C-4 forms. Secondly, the information is not available to the requestor through access to the C-3 and C-4 forms themselves. Since they are obtained by TEC pursuant to its authority under article 5221b-9(g), V.T.C.S., to require such reports, they are confidential.

#### 4. TEC Identification Number

The tax identification number is assigned by TEC as a unique tax identifier which appears on virtually all forms required to be submitted to TEC pursuant to article 5221b-9(g). You state that disclosure of this number would greatly impede TEC's ability to conduct the administration of its tax laws in an efficient and cost-effective manner. Because this number is known only to the employing entity it represents, TEC has relied on knowledge of the number as proof that an employing unit is entitled to receive confidential information. We find that because the TEC number is not information which TEC obtains, but rather information TEC creates and then assigns, it is not confidential under article 5221b-9(g). Attorney General Opinion H-626 (1975).

Having determined that article 5221b-9(g) does not make the TEC identification number confidential, the public availability of the TEC identification number requires further consideration. A federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 3(a)(1) of the Open Records Act. *See* Open Records Decision No. 373 (1983). The attorney general will raise section 3(a)(1) on behalf of governmental bodies. Open Records Decision No. 455 (1987) at 3. We will, therefore, consider whether the TEC number is made confidential by federal administrative regulations.

These regulations, found in section 603.1 *et seq.* of title 20 of the Code of Federal Regulations set forth procedures to insure the confidentiality of certain

information when it is exchanged between TEC and an authorized requesting agency for the purpose of verifying eligibility for and the amount of benefits available under several federally assisted programs, including the federal-state unemployment compensation program. 20 C.F.R. §§ 603.5, 603.6, 603.7. Information in TEC files may be disclosed only to an authorized "requesting agency," as defined in the regulations. *Id.* § 603.5. Once a requesting agency receives the information, it must comply with complex measures to protect the information from unauthorized disclosure. *Id.* § 603.7. Thus, unless the information is released to a requesting agency, information in the files of a state unemployment compensation agency is confidential. *See* Open Records Decision No. 476 (1987).

The protection afforded by these regulations applies to "wage information":

(b) "Wage information" means information about wages as defined in the State's unemployment compensation law and includes the Social Security Number (or numbers, if more than one) and quarterly wages of an employee, and the name, address, *State and (when known) Federal employer identification number of an employer reporting wages under a State unemployment compensation law . . . .*

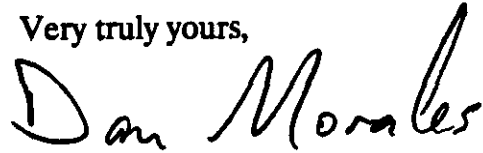
20 C.F.R. § 603.2 (emphasis added). The TEC identification number constitutes a "state employer identification number" within the definition of "wage information." Federal regulations prohibit the disclosure of wage information except to an authorized requesting agency under certain circumstances. 20 C.F.R. § 603.5. The TEC number is made confidential by federal regulatory law; therefore, it is excepted from required public disclosure by section 3(a)(1) of the Open Records Act. *See* Open Records Decision Nos. 476 (1987); 373 (1983).

## SUMMARY

Article 5221b-9(g), V.T.C.S., makes confidential information the Texas Employment Commission obtains in employment records and reports, including SIC numbers and the number of employees of an employing unit. Texas Employment Commission identification numbers are excepted from

disclosure by section 3(a)(1) of the Open Records Act because federal regulations prohibit their public disclosure.

Very truly yours,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, flowing style with a large, prominent "D" and "M".

DAN MORALES  
Attorney General of Texas

WILL PRYOR  
First Assistant Attorney General

MARY KELLER  
Deputy Assistant Attorney General

JUDGE ZOLLIE STEAKLEY (Ret)  
Special Assistant Attorney General

RENEA HICKS  
Special Assistant Attorney General

MADELEINE B. JOHNSON  
Chair, Opinion Committee

Prepared by Kay H. Guajardo  
Assistant Attorney General